matured it would serve as a cover crop and provide feed for game as it matured the following spring.

It was out of this planting schedule that the prosecutions arose. As the trial court made clear, petitioners established that they were engaged in both "normal agricultural operations" and "normal soil stabilization practice(s)." The trial court also ruled that petitioners had established that the spill in field (2) was accidental and the overspray on a road was "accidental". These conclusions were honored by the decision of the Appellate Court.

Petitioners proved at trial that the three samples of accidental spill found on field #2 comprised three square feet out of a total surface area of 48,000 square feet Thus, 99.999944% of field #2 was either properly planted or remedial measures had been taken to cover up the spill. The overspray of wheat seed was on a road adjacent to fields #1 and #2 and ranged as high as 50 grains per square foot. Field #1 did not have any excessive wheat. The government's expert witness, Dr. Bitzer recommended seeding rates (for dry conditions where the seed was not drilled) in excess of the 50 grains per square foot (as found in the overspray).

The Sixth Circuit affirmed Petitioners convictions by concluding that "it is the effect the spill could have on migratory game birds that must be considered in determining whether an areas is baited, not the intent of the individual that caused the spill...", *United States v. Strassweg* (*Id.* at p. 4).

REASONS FOR GRANTING THE WRIT

Petitioners assert that the decision of the Sixth Circuit is, pursuant to Rule 10(c), Supreme Court Rules, a decision which determines an important question of federal law that has not been, but should be settled by this court. The decision lowers the requisite level of proof for guilt (as to this offense) below one of proof beyond a reasonable doubt. It further criminalizes "accidental spills" of seed which are common and incidental to farm and planting operations. It was error not to overturn the conviction of the Petitioners which was based upon accidental spillage while engaged in "normal agricultural operations" and or "normal soil stabilization operations."

The "final rule", as found in 50 C.F.R. §20 recognizes that top sowing of wheat is, in and of itself an attractant, an inducement and a lure to dove. In effect it allows putting seed on the ground, uncovered (although it is careful not to call it bait) in this context so long as it is part of one of three defined categories; "normal agricultural planting", "normal agricultural operation" and "normal soil stabilization practice". The factual underpinning for these classifications is found in 50 C.F.R. §20. The "Final Rule" became effective on 3 June 1999. Within §(4) there is a discussion of the proposed change in the rule to abolish "top sowing or aerial seeding where seeds remained on the ground as a result." To this proposed change there were 221

responses, "the majority of comments opposing this change..." The narrative went on to state "Other comments reflected concern that this change would adversely affect a time-honored, traditional form of hunting." It appears that Congress made political decision to continue to allow hunting over top sown seed so long as the methods of application met certain definitions.

Thus, it is undisputed that Petitioners (as ruled by both the District Court and the Appellate Court) were engaging in "normal agricultural operations" and or "normal soil stabilization practices" or, two out of three of the allowable operations. This allowed them to "top sow wheat." In fact, it is further undisputed that Petitioners were not just top-sowing wheat, but they were liming, fertilizing and cultipacking the seed.

It is also undisputed that the excess wheat was found to be an accidental spill, either through a broken spreader or by overspray at the end of field #1 where the spreader turned around. The government's expert witness, Dr. Morris Bitzer, an agronomist with the University of Kentucky, opined that seed spills were normal and incidental to agricultural operations and that he knew of no farmer who stopped to sweep up the spilled seed. At least two of the game wardens acknowledged this as well.

Petitioners have invested time, money and sweat in improving their hunting property. They

followed good agricultural practices and engaged in top sowing of wheat. Their two fields (totaling twenty-five acres) were covered with the suggested quantity of seed per square foot. Three square feet of field #2 had excessive wheat seed. About 100 feet of roadway had overspray. The logical result of the lower Court's decision is that Petitioners (and other hunters in the future) must sit down and determine whether the accidental and insignificant spill will criminalize hunting over the twenty five acres which were legally planted. It is suggested that the dove flying over may be drawn to the (legally planted) top sown wheat, but how do Petitioners (and future hunters) filter out what effect, if any, the accidental spills had? Petitioners suggest that a finding of guilt arising out of accidental spills violates obviates the requirement of proof beyond a reasonable doubt.

The 5th Circuit Court of Appeals has considered the issue of the intent that must be found in order to convict a citizen under §704(b)(1). In United States v. Adams, 174 F.3d 571 (5th Cir. 1999), that court opined:

> "The subjective intent of the person planting the field should be considered in light of the objective agricultural norms used in the area. This standard introduces both subjective and objective elements into the inquiry. The Latin words "*bona fide*" included in the hunting regulations means "in good faith" or "without

> fraud." Like the Sixth Circuit in *Brandt*, the subjective prong of the test we adopt in not a *mens rea* standard. It looks at the intent of the person scattering the grain, not the intent of the hunter. In other words, it does not incorporate a *scienter* requirement in addition to this circuit's *Delahoussaye* "should have known" standard; it simply recognizes that the language of the exception requires an inquiry into the intent of the planter to determine whether the activity in question was conducted pursuant to a "*bona fide* agricultural operation or procedure"...We thus hold that part of the inquiry into whether an act is "*bona fide*" or not requires the government to prove that the spreader's intentions were not in good faith. Stated another way, the government must prove, "as in any other case where intent is an element of the offense," that the framer's acts were merely a sham to attract migratory birds to hunt."

Petitioners understand that *"bona fide"* agricultural practices are no longer the law. Petitioners further understand that the hunting in *Adams* was decided on the Fifth Circuit's special treatment of "strict liability" and before the substitution in 1999 of "normal agricultural planting" for "*bona fide* agricultural practices", but the analysis, for purposes of determining intent, is instructive. Here the defendant's actions were part

of a long-range plan to develop a commercial hunting preserve. They were reclaiming land and sloughs polluted by salt water. They were participating in the Conservation Reserve Program and were active in numerous wildlife organizations.

The planting schedule, recommended by the State of Kentucky Department of Wildlife for whitetail deer was that used by the defendants.

There was evidence that Petitioner Clifford Romain was disking the ground on the morning of the hunt. Defendants submit that the disking was, in on of itself, evidence of good faith. In *U.S. v. Marston*, 175 F.Supp.1349 (S.D.Ala. 2001), hunters who had planted a field some six days before a hunt had suffered a delay in cultipacking the field because of mechanical breakdown. After the delay they cultipacked the field, but on the morning of the hunt (following a heavy rain the night before) they found exposed concentrations of wheat in the rivulets formed by the rain. The Court, in *Marston* (Id) made a finding of fact that "...Marston went to the dove field and perceived that the heavy rainfall had washed away evidence of the earlier cultipacking and therefore, cultipacked the field a second time in three days that morning."(*Id.* at 1357).

The Sixth Circuit has had its share of dove hunting litigation. In *United States v. Brandt*, 717 F.2d. 955 (1983), the Court declared that orthodox or unorthodox farming practices did not frame the

issue of intent. What was important was whether or not baiting had intentionally lured the birds.

While *Brandt* was decided long before the amendments in 1999 the Court was clearly concerned with some level of intent. Passage of Public Law 105-312 on 30 October 1998 replaced "strict liability" with the test of "if a person knows or should know that the area is baited". If anything this should raise the government's burden for proving some measure of intent. Whether the standard for guilt is characterized as "merely a sham" as in *Adams* or "unorthodox farming practices" as in *Brandt* Petitioners urge this court to disallow guilt based on accidental spillage unaccompanied by intent or bad faith.

The Sixth Circuit rejected Petitioner's suggestion that *Brandt* supported their position. The Sixth Circuit decision is correct that *Brandt* was decided under the "bona fide agricultural practice" standard, but ignored the fact that both the "normal agricultural operation" and "normal soil stabilization practice" are analogous standards which allow top sowing of wheat. Furthermore, the accidental spillage was a factual finding by the trial court and not rebutted by the prosecution. Then, without any support from the public input and agency discussion (50 C.F.R. §20(3) &(4)) and without any citing any cases the trial court and the appellate court elevated "accidental spill" to another hurdle the defendants must overcome.

Petitioners, and other dove hunters, need guidance from this Court as to the interplay of top sowing of grains and accidental spills. Petitioners urge this Court to grant this Petition and let the writ issue reversing the convictions of Petitioners.

CONCLUSIONS

For the matters contained herein Petitioners move this court to issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit with appropriate instructions to reverse and render the convictions of Petitioners and such other and further relief as the ends of justice dictate.

APPENDIX

Pursuant to Rule 14.1(i) include herein is a copy of the opinion of the United States Circuit Court of the Sixth Circuit dated 4 August 2005 affirming the district courts conviction of your Petitioners.

FILED
AUG 4, 2005
LEONARD GREEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USA,	)	
Plaintiff-Appellees,	)	**ON APPEAL FROM**
	)	**THE UNITED**
STATES	)	
v.	)	**DISTRICT COURT**
	)	**FOR THE WESTERN**
Jack Strassweg,	)	**COURT FOR THE**
Rich Krohn and	)	**WESTERN DISTRICT**
Clifford Romain	)	**OF KENTUCKY**
Defendants-Appellants.)		**No. 04-6054**

BEFORE: GIBBONS, COOK, CIRCUIT JUDGES; AND PHILLIPS, DISTRICT JUDGE[1]

PHILLIPS, DISTRICT JUDGE.

Defendants- Appellants, Jack Strassweg and Rich Krohn were charged with hunting doves, as migratory birds, over a baited area in violation of the

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[1] Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Migratory Bird Treaty Act ("MBTA"). Appellant Clifford Romain was charged with aiding and abetting the hunters in taking migratory game birds over a baited area in violation of the MBTA. Each defendant waived his right to the trial by a district judge, and consented to trial, sentencing and judgment by a magistrate judge. The magistrate judge found each defendant guilty, fined each five-hundred dollars ($500.00), and denied their motions for acquittal. Appellants now appeal the denial of their motion for acquittal. For the reasons that follow, we affirm the district court and adopt its thorough, well supported opinion.

The facts of this case are set forth in considerable detail in the published district court opinion, *United States v. Strassweg*, 337 F.Supp.2d 956, 957-963 (W.D.Ky. 2004), and need not be repeated here. Since the facts of this case were not in dispute at trial, the only questions before the district court with respect to appellants took the doves over or on a baited area (16 U.S.C. §704(b)(1); 50 C.F.R. §§20.11(j), (k); 20.21(i)(1)(i), (2),) and whether the appellants knew or reasonably should have proved that the area was baited (16 U.S.C. §404(b)(1); 50 C.F.R. §§20.21(i)(1)(i), (2)). The district court's inquiry as to appellant Romain was whether the United States proved both the underlying crime and that Romain intended to help and did help Strassweg and Krohn commit the crime.

The crux of the issue on appeal is whether the regulations promulgated pursuant to the MBTA permit hunting over or on a baited area where the area becomes baited by an accidental seed spill while an individual is engaged in a normal agricultural operation or a normal soil stabilization practice. As stated by the district court, "what happens if an accidental seed spill occurs while an individual is engaged in a normal agricultural operation soil stabilization practice?" *Strassweg*, 337 F.Supp.2d at 966. Appellants asserted at trial and now on appeal that 50 C.F.R. §§20.21(i)(1)(i) and (2) allowed then to hunt over the field because at the time the spill occurred they had no intent to bait the field.

Appellants rely upon a decision of this court in *United States v. Brandt*, 717 F.2d 955(6 Cir. 1983), which contains language supporting the appellants' position. In fact, this court ruled that "the crucial inquiry with respect to the exceptions in issue is the intent of the person seeding the field." 717 F.2d at 958. However, as pointed out by the district court, the relevant regulations have been amended since the decision of this court in *Brandt* was issued. Prior to 1999, the relevant regulations included an exception for the distribution of seeds as the result of a *bona fide* agricultural operation or procedure. The current regulations require that all planting be done "in accordance with official recommendations." 50 C.F.R. §20.11(g). Thus, the regulations now apply an objective standard in

determining whether the planting was done in "accordance with official recommendations." *See* 64 Fed.Reg. 29799, 29801.

The July 1999 amendments to the MBTA define a baited area as: "any area on which salt, grain, or other feed has been placed, exposed, deposited, distributed, or scattered, if that salt, grain, or other feed could serve as a lure or attraction for migratory game birds to, on, or over areas where hunters are attempting to take them. Any such area will remain a baited area for ten (10) days following the complete removal of all such salt, grain, or other feed." 50 C.F.R. §20.11(j). Baiting is defined by the regulations as "the direct or indirect placing, exposing, depositing, distributing, or scattering of salt, grain, or other feed that could serve as a lure or attraction for migratory game birds to, on, or over any areas where hunters are attempting to take them." 50 C.F.R. §20.11(k). The district court found, and we agree, that neither definition mention, intent, and the language of this court in *Brandt*, that it is the intent of the person seeding the field that must be considered by the court, is no longer correct under the current regulations. Rather, as found by the district court, "it is the effect the spill could have on migratory game birds that must be considered in determining whether an area is baited, not the intent of the individual that caused the spill.. In short, the regulations do not, as defendants [appellants] contend, create an exception that allows hunting on

or cover the area of the spill if the spill is accidental." *Strassweg*, 337 F.Supp.2d at 966-967.

For these reasons, we **AFFIRM** the district court and **ADOPT** its thorough, well reasoned opinion.

Respectfully submitted

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Supreme Court, U.S.
FILED

05-784 NOV 2 - 2005

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Jack Strassweg, Rich Krohn and Clifford Romain,
Petitioners

v.

United States of America
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

APPENDIX OF PETITIONERS

The opinion of the United States District Court:
United States v. Strassweg, 337 F.Supp.2d 956
(W.D.Ky. 2004).

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO
CRIMINAL ACTION NO. 4:03CR-37-ERG

UNITED STATES OF AMERICA

VS.

JACK STRASSWEG, RICK
KROHN, CLIFFORD ROMAIN

FIINDING OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This Class B misdemeanor dove hunting case came before the undersigned United States Magistrate Judge for a bench trial on February 23, 2004, following a waiver of each defendant's right to trial by a district judge pursuant to 18 U.S.C. § 3401(b) (DN 36-38, 39, 40). Essentially, the Superseding Information charges that on or about

September 1, 2002, defendants Jack Strassweg ("Strassweg") and Rick Krohn ("Krohn") were hunting migratory birds (dove) over what they knew or should have known was a baited area, in violation of the Migratory Bird Treaty Act, and that defendant Clifford Romain ("Romain") aided and abetted them in committing the offense. 18 U.S.C. § 2, 16 U.S.C. §§ 703, 704(b)(1), and 707(a) (DN 26).

James H. Barr, III, Assistant United States Attorney, and Randy Ream, Assistant United States Attorney appeared on behalf of the United States of America ("United States"); Defendants Strassweg, Krohn, and Romain appeared with their retained counsel, Richard D. Horne, and W. Mitchell Deep.

During the bench trial, the United States presented several exhibits as well as testimony from

Officers Marcus Bowling, David Kuhn, Ronnie Rich, Greg Noel and Clark Boggs with the Kentucky Department of Fish and Wildlife Resources; Morris Bitzer, Ph.D., and agronomist with the University of Kentucky and former state extension specialist; and Gene Moore a Special Agent with the United States Department of Fish and Wildlife Service, Division of Law Enforcement. The defendants presented several exhibits and testimony from defendant Strassweg, and H. Lee Stibiling, Ph.D., an associate professor, Zoology and Wildlife Science, Auburn University.

In the weeks following trial, the undersigned granted defendants leave to supplement the record with Exhibits 35, 36 and 37 (DN 44, 46, 49, 50, 52, 53). The undersigned also granted defendants leave

to supplement the record with Exhibit 38 which is a redacted version of Special Agent Gene Moore's memorandum memorializing his interview of Mr. Romain on November 6, 2002 (DN 56, 57, 58, 59).

Pursuant to an order by the undersigned (DN 40), the parties filed simultaneous post-trial briefs (DN 42, 43) and rebuttal briefs (DN 47, 48). Additionally, defendants filed a motion for judgment of acquittal (DN 45).

FINDINGS OF FACT

By way of background, Strassweg, Krohn and Romain each have one-third interest in High Ground L.L.C. ("High Ground"), a private hunting club and wildlife refuge located in Henderson County, Kentucky. High Ground started out with the purchase of a 320 acre farm and over the next four

and one-half years grew total of 1600 acres with an additional 350 acres of leased ground. According to Mr. Strassweg the money generated from annual membership fees and day hunting fees is used to pay expenses and make wildlife improvements to the facility.

Referring to the Government's aerial photograph[1] (Government's Exhibit 2-3), Highway 136 runs along with the western edge of Field 1 and Field 2. Field 2 is the northernmost filed and is separated from Field 1 by a dirt access road that runs east from Highway 136 until it ends at a "T" intersection with a second dirt road (Government's Exhibit 2-3). The dirt access road will be referred to as the entrance road. The second dirt road runs in a

[1] The border of Government's Exhibit 2-3 has been marked to show the points of the compass.

north/south direction along the eastern borders of Field 1 and Field 2 (Government's Exhibit 2-3). The second dirt road will be referred to as the "Oil Road."[2] During the course of trial the parties presented testimonial and demonstrative evidence regarding the conditions that existed on Field 1, Field 2, and the Oil road, all of which are on High Ground's property.

In the late night hours of Friday, August 30, 2002, Officers Marcus Bowling, David Kuhn, and Ronnie Rick with the Kentucky Department of Fish and Wildlife Resources ("Fish & Wildlife"), investigated a tip about a baited field at High Ground. With flashlight in hand, Officer Rick

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[2]Mr. Strassweg's testimony indicates before High Ground existed the Oil Road was cut to allow access to oil wells.

inspected both fields and the Oil Road. At the time of the inspection both fields had alternation strips of vegetation and seeded bare ground.

Officer Rich designated one seed sample site on the Oil Road and three seed sample sites in Field 2 where he found high concentrations of seed on the ground.[3] Although Officer Rich noted concentrations of seed in Field 2, the highest concentration of seed were located in the two strips where the sample sites are located. Officer Rich did not find any high concentration of seed in Field 1. The locations of the seed sample sites are depicted on one of the Government's aerial photographs

[3]Officer Rich inspected Field 1 by walking East from Highway 136 to the Oil Road in a wide zig zag path. Officer Rich then walked the Oil Road in a northerly direction until he reached Field 2. Officer Rich selected one site on the Oil Road where he observed a high concentration of seed. He inspected Field 2 by walking west toward Highway 136 in a wide zig zag path.

(Government's Exhibit 2-3). Officer Bowling video taped[4] (Government's Exhibit 3) and Officer Kuhn photographed the seed sampling process (Government's Collective Exhibit 5). A few hours after they departed, in the early morning hours of August 31, Officers Bowling and Kuhn returned and took fresh samples from a spot on the Oil Road (1-b) and a spot in Field 2 (4-b) because Officer Bowling discovered the original samples accidentally got mixed together. The seed samples are marked Government's Exhibits 4-1b, 4-2, 4-3, 4-4b.[5] Officer Bowling recalled that at the time the seed samples

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[4] The undersigned sustained defendant's evidentiary objection to the audio portion of the video tape. Therefore, the audio portion of the video tape has not been considered in making the factual findings set forth within this document.

[5] Officer Bowling testified that in accordance with evidence collection procedures, each seed sample was taken from a uniform one square foot area.

were taken from the Oil Road and bare strips in Field 2 the dirt was hard packed.

Dove season opened on the following Sunday, September 1, 2002, at 11: a.m. On that Sunday morning, at approximately 10:00 to 10:30 a.m., Officers Rich, Bowling, Kuhn, Greg Noel, and Captain Clark Boggs traveled to High Ground and began surveillance from the wooded key hole area just north of Field 2 (Government's Exhibit 2-3). Officer Rich made a video tape of what he saw prior to and after 11:00 a.m. start of the hunting season (Government's Exhibit 6). When they arrived, the officers observed a tractor discing parts of Field 2. They also noted that the seed sample sites in Field 2 had been disced. After the 11:00 a.m. start of dove season, officers observed several hunters actively

taking part in the dove hunt in and around Field 2 and the Oil Road.

The officers observed the dove hunt for a period of time before they approached the hunters. Officer Kuhn spoke with Mr. Krohn. His hunting site was in the area where the southeast corner of Field 2 and the Oil Road meet. Mr. Krohn possessed a loaded shotgun and eight doves.

Officer Rich spoke with Mr. Eakins and his twelve-year old daughter. Their hunting site was in the area near the telephone pole in Field 2.

Officer Noel spoke with Mr. Strassweg. His hunting site was on the Oil Road near the northeast corner of Field 2. When Officer Noel spoke with Mr. Strassweg he observed Mr. Strassweg with a shotgun and two doves.

Captain Boggs also spoke with Messrs. Strassweg and Krohn. He noted seed on the Oil Road next to Field 1. Captain Boggs commented that it looked like the road had been sown. He also noted a spot on the Oil Road where it looked like a dip had jarred the spreader causing it to spill wheat seed.

The Government's expert witness, Morris Bitzer, is employed by the University of Kentucky as a research specialist in agronomy and grain crops. For approximately thirty years he was employed by the United States Department of Agriculture as a State Extension/Grain Crop Specialist. His duties as a State Extension/Grain Crop Specialist included making planting recommendations.